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SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

ROBERT L. DESEYN,
Petitioner,

vs.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit

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63 pp

QUESTIONS PRESENTED

I. Whether respondent, sued as a 42 U.S.C. §1983 "person", should be required to answer and defend against petitioner's claim, based on 33 U.S.C. §407, that respondent's actions will pollute the freshwater reservoir under jurisdiction of the U.S. Army Corps of Engineers.

II. Whether brine produced from respondent's oil and gas well drilling on a tract of land having a corner underneath the water reservoir under jurisdiction of the U.S. Army Corps of Engineers, is "refuse matter of any kind or description whatever."

III. Whether petitioner, having been earlier granted by respondent a right of access to and full year round recreational use of the freshwater reservoir under jurisdiction of the U.S. Army Corps of Engi-

neers, has standing to assert a cause of action for injunctive relief against respondent under 33 U.S.C. §407 prohibiting pollution of the reservoir.

IV. Whether 33 U.S.C. §407 creates a private cause of action enabling petitioner to seek an evidentiary hearing and/or trial on the merits of a federal question claim for equitable relief alleging probable pollution of a water reservoir under jurisdiction of the U.S. Army Corps of Engineers by respondent.

V. Whether the *sua sponte* summary judgment action taken by the district court against petitioner's case, without notice required by FRCP 56(c) and based solely upon a challenged old oil and gas lease with a stranger, was proper.

The following persons have sought to join petitioner as additional plaintffs in the district court.

Edward Allmon
Peter Danielak
Arthur Dietrich
Charles Digby
Ronald DuPlain
Joe Eames
Keith Eames
Lori Eames
Wayne Eldridge
Margaret Ervin
Robert Fasnacht
Norman W. Herrit
Robert Johnston
Ronald Mangon
George Motz
R. P. Ruof
Thomas Schumaker
Fred W. Shambarger
Robert Urban
Harold Weatherbee
Thomas Wetzler
Shirley Ziccardi

Each of the persons named is a North Shore Area resident owning a residence and water well and using the waters of Atwood Lake.

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THE OPINIONS BELOW

None of the opinions below have been published. Each opinion [redacted] SUBSTITUTE and is in the Appendix bound hereto.

The memorandum opinion and order and judgment entry of the district court, filed on May 20, 1983, are on A1-A7.

The *per curiam*, not for publication, opinion of the Sixth Circuit, filed September 11, 1984, affirming the district court's decision, is on A8-A10.

The order of Sixth Circuit on rehearing, filed December 7, 1984, is on A11-A12.

JURISDICTIONAL GROUNDS

The date of the judgment of the Sixth Circuit Court of Appeals sought to be reviewed was September 11, 1984. The date of the order denying a rehearing was December 7, 1984. The statutory provision believed to confer on the Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

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STATEMENT OF THE CASE

The case pleads and stands on old federal law: §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983; The Constitution of the United States, Amendments V and XIV; §13 of The Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §407.

Basic to any further consideration by this Court of the case are the rhetorical questions: Should the federal courts in Ohio permit [not prevent] drilling of oil and gas wells on forested public land controlled by respondent Ohio law watershed conservancy district immediately adjacent a small freshwater lake under jurisdiction of the U.S. Army Corps of Engineers [Atwood Lake], at the demonstrated loss of 50 year old trees and probable pollution of the lake waters and destruction of aquifers for private water wells? Or, should these

federal courts [sitting in Cleveland and Cincinnati] be encouraged by this Court to fashion a remedy to reforest the trees, protect the lake waters and prevent irreparable damage to the value of residential dwellings and the contamination of private water wells owned by petitioner and his class members?

* * * *

Several facts material to the consideration of the questions presented were made known to JUSTICE O'CONNOR in the format of an APPLICATION FOR INJUNCTION PENDING APPEAL TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. This application bearing the same party caption as this case, *Robert L. DeSeyn v. Muskingum Watershed Conservancy District*, was filed June 29, 1983, docketed in the October Term, 1982, as A-1050, and was denied the day filed.

Petitioner is a citizen of the United States and a resident of the State of Ohio, and the owner since 1970 of a residential dwelling and private water well on a lot first leased in 1955 from respondent in the Atwood Lake North Shore Cottage Site Area. The North Shore Area was formally platted and laid out by respondent in 1955 to offer for long term lease to the public 60+ cottage and home sites or lots on two access roads running parallel to Atwood Lake [PT7]. Respondent granted each North Shore Area lessee a right of access to the lake waters, a right to use the lake for fishing, boating, skating and other sports, a right to construct a boat dock, and a right to place two boats on the lake for personal use.

The North Shore Area comprises the lower portion of a 113 acre tract. The southeastern corner of the tract is sub-

merged beneath the waters of Atwood Lake. Immediately north of the cottage and home site area is a forested alluvial-type ridge running northeast to southwest. Atop the ridge are three well drilling sites (B9, B10 & B11) demonstrated as being owned and operated by respondent [PT3-1]. Contrary to a gratuitous finding of fact made by the court of appeals, documentary evidence proffered by petitioner would establish that well site B-11 is less than 200 feet from a group of lots, well site B-10 is less than 350 feet from another group of lots, and well site B-9 is less than 400 feet from the lot occupied by petitioner.

Respondent Muskingum Watershed Conservancy District is a political subdivision and a public corporation of the State of Ohio created by, and acting under, Section 6101 of the Ohio Revised Code. Respondent acts independently, without state

executive or legislative branch supervision or accountability, through an entrenched self-perpetuating management, protected by eminent counsel. The history of the enabling legislation is reported in *Orr v. Allen*, 245 F. 846 (1917), aff'd 248 U.S. 35, 39 S.Ct. 23 (1918). Respondent is a suable "person" under 42 U.S.C. §1983 because of the decision in *Cook v. Muskingum Watershed Conservancy District*, 439 U.S. 810, 99 S.Ct. 68, 58 L.Ed.2d 102 (1978).

After its formation in 1933 for the purposes of recreation, conservation, forestry and water supply, respondent gained title to substantial acreage surrounding recreational lakes created by reservoir dams and the financial resources of the U.S. Army Corps of Engineers. The principal managing officer of respondent, the acknowledged "father" of the organization, was retired in 1965. Since then, time and

circumstances have resulted in respondent being operated primarily as a retained income producing business rather than an organization dedicated to recreation, conservation, forestry and water supply on behalf of the people of Ohio. An Ohio law watershed conservancy district's "tax-immune" status assures that none of the annual revenues flow to the general fund of the State of Ohio. So far as anyone knows, no reimbursement is being made to the Corps of Engineers for operating costs and maintenance of the reservoir dams.

The hills and valleys surrounding Atwood Lake, reforested in the 1930's using Civilian Conservation Corps labor, were discovered in 1980 to contain 6,823,000 (MCF) of recoverable gas reserves and 7,800,000 (BO) of recoverable oil reserves.

Petitioner purchased his property in North Shore Cottage Area in 1970. His

predecessor in interest sold to him a summer cottage and water well and assigned a "Cottage Site Lease" from respondent first granted in 1955. The assignment was a form document prepared by an attorney for respondent.

In 1971, petitioner and his family decided to move their permanent residence from Barberton to North Shore so as to have year round use and enjoyment of the woods and lake. To make the summer cottage more habitable for permanent dwelling it was necessary to make improvements and add approximately 1,600 sq. ft. of living space. As required by respondent, the building plans and cost estimates were submitted to respondent's engineering staff for approval. After approval by respondent, mortgage financing was obtained, the new construction was completed, and petitioner now owned a home alleged (in 1982) as having "an estimated current market value of $75,000."

During October 1982, petitioner took a walk through the woods behind North Shore, just to the north of his home. At the top of the ridge he saw where bulldozers and stump-pullers had cleared a path running from end to end above the North Shore Cottage Site Area. He saw uprooted trees lying where they had fallen. Upon further investigation, he learned that respondent was going to drill at least three gas and oil wells on top of the ridge.

Petitioner retained counsel who contacted the senior attorney in the publicly known law firm for respondent. By letter of October 28, 1982 [not in the record], counsel for respondent stated in relevant part-- "Following our phone conversation of this morning, I went to the offices of the Conservancy District to inquire about the oil and gas development in the North Shore Area at Atwood Lake. [2nd ¶] It is true that

they are planning to drill three wells in that area in the future. Drilling was to have commenced in 1981 but has been delayed. We are not sure how soon drilling is to commence." Counsel for respondent had defined a case or controversy warranting filing of a complaint in the nearest federal district court.

The verified Complaint in Case No. C82-3108A was filed November 3, 1982 in the Northern District of Ohio, Eastern Division at Akron, Ohio. Somehow after filing, the case was assigned to a district judge sitting in Cleveland.

The pleaded basis for federal jurisdiction in the court of first instance is:

> ¶1, action brought under 42 U.S.C. §1983 and its jurisdictional counterpart 28 U.S.C. §1343, seeking declaratory and injunctive relief and damages against a political subdivision and public corporation of the State of Ohio;
>
> ¶2, action also brought under 28 U.S.C. §1331;

> ¶3, action requests a declaratory judgment pursuant to 28 U.S.C. §2201; and
>
> ¶4, action also includes a request for immediate injunctive relief under Rule 65, Fed.R.Civ.P.

The Complaint pled two issues of material facts for resolution by declaratory judgments. Does a "Cottage Site Lease" limitation subjecting the petitioner's property to "all existing oil and gas leases and utility rights-of-way thereunto pertaining . . ." apply only to leases for existing oil and gas wells [¶10]? Are the prospective oil and gas well drilling activities by respondent in the North Shore area adjacent to Atwood Lake outside the scope of its statutory authority *(ultra vires)* [¶12]? Judicial determination of the existing oil and gas lease issue presents a "what would a reasonable person have thought" fact issue. Judicial determination of the *ultra vires* issue is probably solely a question of law.

Under the umbrella of accountability to a "citizen of the United States" for an action "under color of" Ohio law, as provided by 42 U.S.C. §1983, the federal claims are based on the same nucleus of operative facts. Well drilling by respondent is "arbitrary, capricious and unreasonable, and without due process of law" [Claim 1]. Petitioner's private property would be "taken for public use, without just compensation" [Claim II]. The well drilling activity by respondent "will produce refuse matter of many kinds and description which will flow by gravity alone or by natural drainage, or be carried by rainfall or surface water, and be deposited onto or over the water reservoir of Atwood Lake" [Claim III].

The Complaint has four pendent state law claims based on the same nucleus of facts underlying the federal claims. Two

claims are based on Ohio statutes; two claims are based on contract. Contamination of the underground water in the aquifer for the water well owned by petitioner "by substances resulting, obtained or produced in connection with exploration, drilling, or producing of oil or gas is prohibited" [Claim IV]. Pollution of surface and underground waters of the State of Ohio is "hereby declared to be a public nuisance" [Claim V]. Well drilling by respondent and the consequences of such activity will breach an implied contract created by the "Cottage Site Lease"; will be a use of "lands owned or controlled by" respondent for a "purpose that might endanger the health or unreasonably disturb the peace or quiet of persons occupying other lands of the" respondent [Claim VI]. Well drilling by respondent will breach express covenant found in "Cottage Site

Lease"; will wrongfully deprive petitioner of the convenanted right to "peaceably hold and enjoy the demised premises during said term without any interruption" by respondent [Claim VII].

Each claim was also brought as a class action under Rule 23(b)(2), Fed.R.Civ.P. The twenty-two (22) North Shore Area residents listed on page 3 hereof, were named in a Motion Pursuant to Rule 15, Fed.R.Civ.P., Adding Plaintiffs in Accordance with Rule 20, Fed.R.Civ.P., filed December 16, 1982. Although not opposed by respondent, the district court did not reach the motion prior to its *sua sponte* summary judgment action.

November 23, 1982, the parties filed their principal motions. Petitioner filed a Motion for Preliminary Injunction and Brief in Support with exhibits showing likelihood of damage and irreparable in-

jury. (The district court did not reach this motion for ruling thereon). Respondent filed a Motion to Dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(1)(2) and (6) with three documentary exhibits and two affidavits, attacking subject matter jurisdiction, jurisdiction over respondent, and the failure to state a claim upon which relief could be granted.

December 3, 1982, the parties cross-filed their response to the two pending November 23 motions.

On May 20, 1983, the district court summarily dismissed the Complaint of petitioner by *sua sponte* without notice treating the respondent's November 23 motion to dismiss as a motion for summary judgment under Rule 56, Fed.R.Civ.P.

Petitioner's appeal to the Sixth Circuit was perfected and has been heard.

ARGUMENTS
Question I

THE COURTS BELOW SHOULD NOT HAVE PROTECTED THE 42 U.S.C. §1983 RESPONDENT FROM PETITIONER'S CLAIM AGAINST POLLUTION OF THE WATERS OF THE CORPS OF ENGINEERS LAKE.

Claim III of the complaint of petitioner reads:

CLAIM III
(Refuse Act of 1899)

16(a) Atwood Lake is a reservoir of navigable water of the United States, or, a reservoir of a tributary of navigable water of the United States.

16(b) The water reservoir of Atwood Lake was created by an earthen dam built and thereafter maintained, operated and controlled by the United States Department of the Army, Office of the Chief of Engineers, Washington, D.C. 20314.

16(c) Operation and control of the water reservoir of Atwood Lake has a direct effect on the waters of the Muskingum River, joining the Ohio River at Marietta, Ohio, and is under the direct and day-to-day control of the U.S. Army Engineer District, Huntington, P.O. Box 2127, Huntington, West Virginia 25721.

16(d) The oil and gas well drilling activities in the North Shore area adjacent to Atwood Lake with the consent and authorization of defendant will produce refuse matter of many kinds and description which will flow by gravity alone or by natural drainage, or be carried by rainfall or surface water, and be deposited onto or over the water reservoir of Atwood Lake.

16(e) According to the law of the United States of America, as set forth in 33 U.S.C. §407, '[i]t shall, not be lawful to . . . deposit . . . from the shore . . . any kind of refuse matter of any kind or desciption whatever . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . . .'

Question I is presented in the context of one decision by the Court: *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); which reviewed on certiorari *National Sea Clammers Association v. City of New York*, 616 F.2d 1222 (CA3 1980).

Part III of the opinion of the Third Circuit (616 F.2d, at 1232) dealt with 33

U.S.C. §407. It was held--

> The Rivers and Harbors Act is limited by its terms to enforcement by the United States Attorneys. 33 U.S.C. §413 (1976). The majority of courts, and the courts of this circuit that have addressed this issue, have held that the Act precludes private suits and have thus refused to find an implied cause of action.

The grant of certiorari was limited to three questions, 449 U.S. 917, 101 S.Ct. 314, 66 L.Ed.2d 145 (1980). These questions do not include or reach the ruling by the Third Circuit quoted next above.

The majority opinion in *Middlesex County* includes persuasive reasoning favorable to maintenance of petitioner's 33 U.S.C. §407 claim against Atwood Lake pollution by respondent's oil and gas well drilling.

Writing in Part IIB (beginning, 453 U.S., at 19, 101 S.Ct., at 2625), JUSTICE POWELL says --

> Although the parties have not suggested it, there remains a possible alternative source of express congressional authorization of private

> suits under these Acts. Last Term, in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the Court construed 42 U.S.C. §1983 as authorizing suits to redress violations by state officials of rights created by federal statutes. Accordingly, it could be argued that respondents may sue the municipalities and sewerage boards among the petitioners under the FWPCA and MPRSA by virtue of a right of action created by §1983.
>
> It is appropriate to reach the question of the applicability of *Maine v. Thiboutot* to this setting, despite the failure of respondents to raise it here or below.. . . [I]f controlling, this argument would obviate the need to consider whether Congress intended to authorize private suits to enforce these particularly federal statutes. The claim brought here arguably falls within the scope of *Maine v. Thiboutot* because it involves a suit by a private party claiming that a federal statute has been violated under color of state law, causing an injury [emphasis added].

Petitioner has sued respondent under 42 U.S.C. §1983, factual issues of probable water pollution are well pleaded, and a federal statute of 19th century vintage and lacking in "comprehensive enforcement

mechanisms" is likely to be violated unless respondent is enjoined.

The question of whether §13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §407, created "rights, privileges, or immunities" within the meaning of 42 U.S.C. §1983 has been reached in this case.

Petitioner further relies on the reasoning in *Middlesex County* of JUSTICE STEVENS, in concurrence (beginning 453 U.S., at 22, 101 S.Ct., at 2615),

> When should a person injured by a violation of federal law be allowed to recover his damages in a federal court? This seemingly simple question has recently presented the Court with more difficulty than most substantive questions that come before us. During most of our history, however, a simple presumption usually provided the answer. Although criminal laws and legislation enacted for the benefit of the public at large were expected to be enforced by public officials, a statute enacted for the benefit of a special class presumptively afforded a remedy for members of that class injured by violations of the statute. . . . Applying that presump-

tion, our truly conservative federal judges -- men like Justice Harlan, Justice Clark, Justice Frankfurter, and Judge Kirkpatrick-readily concluded that it was appropriate to allow private parties who had been injured by a violation of statute enacted for their special benefit to obtain judicial relief. For rules are meant to be obeyed, and those who violate them should be held responsible for their misdeeds. Since the earliest days of the common law, it has been the business of courts to fashion remedies for wrongs [emphasis added].

ARGUMENTS
Question II

BRINE FROM OIL AND GAS WELL DRILLING WILL POLLUTE THE WATERS OF THE CORPS OF ENGINEERS LAKE.

Throughout Northeast-Central Ohio, including Atwood Lake, oil and gas is found in Clinton Sandstone, at depths of 4000 to 5000 feet. Clinton Sandstone, when being drilled, and at all times after drilling, produces large volumes of salt water or brine.

> The . . . inevitable by-product of oil drilling is 'produced water' [salt water or brine]. The underground reservoirs that contain oil also contain fossil seawater -- water that has been in the ground during the time of oil formation. This unsavory mineral water rises to the surface in large quantities with the oil during production.

American Petroleum Institute v. E.P.A., 661 F.2d 340, 343 (CA5, Unit A, 1981).

The district court ruled:

> "the plaintiff does not specify what types of refuse matter the drilling

> will produce which might impede or obstruct navigation."

Clearly, the district court did think that salting a small freshwater lake would not impede or obstruct navigation.

On appeal to the Sixth Circuit, petitioner cited and argued *United States* v. *Pennsylvania Industrial Chemical Corp. [PICCO]*, 411 U.S. 655, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973). Writing for the Court, JUSTICE REHNQUIST stated:

> At the outset, we observe that the issue here is not whether §13 [33 U.S.C. §407] in fact applies to water deposits that have no tendency to affect navigation. For, although there was much dispute on this question in the past, in *United States* v. *Standard Oil Co.*, [384 U.S., at 228-229, 230, 86 S.Ct. at 1429, 1430, (1966)], we held that 'the "serious injury" to our watercourses . . . sought to be remedied [by the 1899 Act] was caused in part by obstacles that impeded navigation and in part by pollution,' and that the term 'refuse' as used in §13 'includes all foreign substances and pollutants . . . .' Since then, the lower courts have almost universally agreed, . . . that §13 is to be read in accordance with its plain language as imposing a flat ban on the unauthor-

> ized deposit of foreign substances into navigable waters, regardless of the effect on navigation.

411 U.S. at 670-671, 93 S.Ct. at 1814, 1815 [emphasis added].

In PICCO, the Court was faced with the fact of

> "the Army Corps of Engineers' long-standing administrative construction of §13 as limited to water deposits that impede or obstruct navigation",

411 U.S. at 657, 93 S.Ct., at 1808, despite or ignoring the decision in *Standard Oil*.

In petitioner's case, the district court adopted the view of the Corps of Engineers -- the refuse matter must "impede or obstruct navigation," (salt water or brine in a small freshwater lake is not bad). Before the panel of Sixth Circuit, petitioner's reliance on the "flat ban" controlling judicial interpretation of PICCO fell on deaf ears. The panel of the Sixth Circuit has, for no stated reason, declined to follow its own precedent and

prior interpretation of 33 U.S.C. §407; *United States* v. *Standard Oil Co.*; and *United States* v. *Pennsylvania Industrial Chemical Corp.*

Petitioner has cited and argued *United States* v. *Hamel*, 551 F.2d 107 (CA6 1977). *Hamel* is a considered and well reasoned opinion interpreting 33 U.S.C. §407 in view of both *Standard Oil* and *Pennsylvania Industrial Chemical Corp.*

In *Hamel*, a panel of the Sixth Circuit stated in relevant part as to petitioner's case --

> The Refuse Act of 1899, 33 U.S.C. §407, is itself a codification of prior legislation. It prohibits the discharge of 'any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom, in a liquid state, into any navigable water . . . .' 551 F.2d at 110-111.

Pennsylvania Industrial Chemical Corp. is cited in footnote 4 of *Hamel* for the proposition of law --

> Although originally thought only to bar the discharge of substances which

> would impair navigability, it is clear now that the Act bars the discharge of all foreign substances outside the scope of its exception.

For whatever its reasons, the panel of the Sixth Circuit has chosen to not even mention these three authorities on an issue set forth for appellate review. Particularly perplexing to petitioner is the manifest failure to adhere to the codicil in *Hamel* --

> Appellant nevertheless urges us to eschew our construction of the Act out of deference to the general rule that penal statutes are strictly and narrowly construed.. . . It is the rule of *Standard Oil*, however, and indeed of our own circuit's interpretation of water pollution legislation that it be given a generous rather than a niggardly construction.

551 F.2d, at 112.

If petitioner's request for certiorari is granted, Question II will present the Court with an opportunity to bring *Standard Oil and PICCO* current in the context of brine produced from oil and gas well drill-

ing; to reinstate *Hamel* as controlling authority in the Sixth Circuit; and to deal with an extremely relevant environmental and public policy issue -- Should §13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §407, apply even when the foreign substance or pollutant may reach the body of navigable water in liquid form?

ARGUMENTS
Question III

PETITIONER HAS A SPECIAL INTEREST IN PREVENTING POLLUTION OF THE WATERS OF THE CORPS OF ENGINEERS LAKE.

The Cottage Site Lease assigned to petitioner in 1970, granted to petitioner's predecessor in interest--

> . . . the right of access to the waters of Atwood Reservoir at an approved point and to use said waters for fishing, boating and other sports . . . and the right to construct an approved boat dock at the said point of access, and the right to place not more than two (2) boats on said waters at said point [sic] for the use of himself, members of his family and his guests,

If there will be or is brine pollution of Atwood Lake from the oil and gas well drilling activities of respondent, the "rights" of petitioner (and the 22 additional plaintiffs who have identical lease agreements) relative to the lake water could or would be detrimentally affected.

Petitioner understands that, functionally, standing is premised on assumptions that parties with a real interest will more effectively litigate a case, that judicial resources will be used more efficiently as a result and that unnecessary constitutional adjudication will be minimized. The issue of standing requires an inquiry both into the existence of actual or threatened injury affecting the plaintiff directly and into the relationship between the plaintiff and the legal claim asserted. This injury in fact or "personal stake" requirement is a constitutional minimum. *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Petitioner also understands that the seminal standing case for aesthetic and environmental issues is *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

The Sierra Club claimed standing to maintain its "public interest" lawsuit because it had "'a special interest in the conservation and [the] sound maintenance of the national parks, game refuges and forests of the country'". 405 U.S., at 730, 92 S.Ct., at 1364. This Court held those allegations insufficient.

Sierra Club was soon followed by *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Writing for the Court, JUSTICE STEWART explained Sierra Club and found that the district court was correct in denying defendants' motion to dismiss the complaint for failure of plaintiff to allege sufficient standing to bring the lawsuit.

Persuasive for petitioner's case is footnote 14 in *SCRAP*, quoted in part--

> The Government urges us to limit standing to those who have been 'sig-

> nificantly' affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggreived,' and it serves to distinguish a person with a direct stake in the outcome of a litigation--even though small--from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote,. . . a $5 fine and costs, . . . and a $1.50 poll tax,. . . . As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle: the trifle is the basis for standing and the principle supplies the motivation.'

Having been treated to summary dispositions in the courts below, petitioner must ask whether his status as a tenant "on land leased from the defendant" contributed to the conclusion of law that he "does not have standing to assert a cause of action under 33 U.S.C. §407." After all, a lessee of a small piece of land is not a fee holder--good and well mannered lessees do

not protest against the lessor's acts on other pieces of the land. Should the Court determine that the courts below might have been inherently biased because a tenant was complaining about a landlord, a reversal and remand could cite *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 405, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), which held that, at least as to allegedly racially discriminatory conduct of a landlord, tenants have a right to sue.

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), considered the rules of standing in the context of various categories of plaintiffs suing various members of zoning, planning and town boards, involving allegedly discriminatory zoning ordinances. The district court had granted a motion to dismiss the complaint for lack of standing and for failure to state a claim on which relief could be

granted. The Second Circuit affirmed. A majority of the Court also affirmed.

Authored by JUSTICE POWELL, Part II of *Warth* v. *Seldin* goes to general principles of standing. One paragraph is particularly applicable to consideration by the Court of petitioner's case.

> Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal,. . . . it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .' Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on

> the legal rights of third parties.... In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff.... Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. . . . But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim.

422 U.S., at 498-501, 95 S.Ct., at 2205-2206.

ARGUMENTS
Question IV

PETITIONER SHOULD HAVE A PRIVATE CAUSE OF ACTION FOR EQUITABLE RELIEF AGAINST POLLUTION OF THE WATERS OF THE CORPS OF ENGINEERS' LAKE BASED ON 33 U.S.C. §407.

In both courts below, petitioner has strongly argued the four factors of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), as supporting maintenance of Claim III based on 33 U.S.C. §407; particularly where the injunctive relief sought by petitioner is to prevent pollution of the lake waters. The best relief is not drilling the oil and gas wells. Or, if drilled, operating the wells with satisfactory off-site brine disposal. As a last resort, the wells can be ordered plugged or sealed.

The applicability of *Cort v. Ash* has been suggested by another district court in *Yates v. Island Creek Coal Co.*, 485 F.Supp.

995, at 997. In *Yates*, a claim based on 33 U.S.C. §407 sought damages to property from a flood attributable to strip mining operations. The complaint was dismissed.

The four factors of *Cort v. Ash*, for determining whether a federal penal statute impliedly creates a private cause of action in favor of a plaintiff, were written for the Court by JUSTICE BRENNAN.

> [1] First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?
>
> [2] Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> [3] Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for plaintiff?
>
> [4] And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S., at 78, 95 S.Ct., at 2088.

Without acknowledging petitioner's arguments, making no mention of *Cort v. Ash*, the panel of the Sixth Circuit merely says, in two sentences--

> Plaintiff also asserted a cause of action under 33 U.S.C. §407. Dismissal by the district court of this asserted cause of action was proper.

That another panel of the Sixth Circuit does regard the *Cort v. Ash* factors as having merit and being worthy of consideration at the appellate level is evidenced by *Howard v. Pierce*, 738 F.2d 722 (CA6, 1984). This case, decided three months prior to disposition of petitioner's case by another panel of the Sixth Circuit, does acknowledge that

> [i]n 1975, a unanimous Supreme Court set forth four factors which are relevant in determining whether Congress intended to create a private remedy. *Cort v. Ash*....

738 F.2d, at 724. The *Howard* panel also noted, as in petitioner's case, that the nature of relief requested, only injunctive

and declaratory relief (rather than damages), obviates any concern about interference with statutory purpose. 738 F.2d, at 729.

Consideration of Question IV would provide the Court with an occasion to mandate Sixth Circuit as to the use of *Cort v. Ash* in all relevant cases, not just selected cases, involving a private cause of action based on a federal statute.

Both courts below cited *City of Evansville, Indiana v. Kentucky Liquid Recycling*, 604 F.2d 1084 (CA7 1979). *City of Evansville* was instituted to recover damages incurred by reason of discharge of contaminants into the Ohio River. The action made damage claims under 33 U.S.C. §407, the Federal Water Pollution Act [33 U.S.C. §1365], the Safe Drinking Water Act [42 U.S.C. §300f, *et seq.*], and the federal common law of nuisance.

The Seventh Circuit affirmed the district court ruling that there was no damage claim under the federal statutes; but left standing a damage claim founded on the federal common law of nuisance (with 28 U.S.C. §1331 jurisdiction), 604 F.2d at 1017. The Seventh Circuit also observed that if an implied right of action under 33 U.S.C. §407

> had been the only right asserted, the complaint should have been dismissed for failure to state a claim on which relief should be granted. Rule 12(b)(6), Fed.R.Civ.P.

604 F.2d, at 1011, fn.4. The mode of dismissal by the district court, as affirmed by the panel of the Sixth Circuit, is "on the merits" of the case which precludes petitioner from amending Claim III of his complaint.

There are decisions by the Court subsequent to *Cort v. Ash* which lend support to maintenance of petitioner's case.

United States v. *Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980) is authority for arguing that an escape of oil from an oil retention pit at any of respondent's three well drilling sites on the ridge behind the North Shore Area, which oil could quickly find its way onto the waters of Atwood Lake, would be a "strict liability crime" under 33 U.S.C. §407.

In *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), the Court affirmed a district court dismissal of an action for relief against transfer of government property to a religious organization without payment therefore on the ground that plaintiff lacked standing. However, writing for the majority, in Part II JUSTICE REHNQUIST explains and characterizes several authorities generally supporting maintenance of

petitioner's Claim III for injunctive relief against pollution of the waters of Atwood Lake.

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979).
>
> [T]he injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976).

Both quotations above, 454 U.S., at 472, 102 S.Ct., at 758.

> [T]he Court has required that the plaintiff's Complaint fall within 'the zones of interest to be protected or regulated by the statute or constitutional guarantee in question' *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970).

454 U.S., at 475, 102 S.Ct., at 760.

The most recent "standing" decision by the Court appears to be *Allen v. Wright*,

____U.S.____, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Although a district court dismissal on standing grounds was affirmed, writing for the majority in Part IIA, JUSTICE O'CONNOR suggests a set of simpler factors to determine standing.

> Determining standing in a particular case may be facilitated by clarifying principles or even clean rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. [Q1] Is the injury too abstract, or otherwise not appropriate, to be judicially cognizable? [Q2] Is the line of causation between the illegal conduct and injury too attenuated? [Q3] Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

(____U.S., at ____, 104 S.Ct., at 3325.)

Relevant to petitioner's case, the three questions in *Allen v. Wright* may be answered:

[Q1] No. Water pollution is prohibited by 33 U.S.C. §407;

[Q2] No. Pollutants draining down the ridge from the well sites will, because of topographical features at the well sites, inevitably reach the waters of Atwood Lake;

[Q3] Injunctive relief can effectively prohibit water pollution.

In petitioner's case, the federal government and the U.S. Army Corps of Engineers is not a named defendant. Nor is the government of the State of Ohio a named defendant. Only the respondent, an Ohio law watershed conservancy district need be subject to the jurisdiction of the federal courts.

ARGUMENTS
Question V

THE SUMMARY JUDGMENT ACTION USED BY THE DISTRICT COURT AGAINST PETITIONER AND APPROVED BY THE COURT OF APPEALS WAS IMPROPER.

Anti-environmental activities of the respondent Ohio law watershed conservancy district appear to be favored by the federal judiciary sitting in Ohio. Witness the way in which the district court has destroyed petitioner's case and the carte blanche ratification by a panel of Sixth Circuit. Petitioner's Constitutional guarantees and state law statutory and contract rights to environmental protection were abrogated and purged, at both levels, because on June 1, 1967, respondent entered into an oil and gas lease with the Oxford Oil Company. This item of evidence accepted by both courts below is an eight-page document (Exhibit C) attested and sworn to by an affidavit of Roger A. Devorace.

The injustice in this case is the insistence by the panel of Sixth Circuit that all controversies are determined, all issues are decided (except 33 U.S.C. §407) because respondent had a 1967 oil and gas well lease with a stranger. The writer of the ORDER denying petitioner's FRAP 40 petition for rehearing says that "[p]laintiff has never demonstrated any basis to challenge the validity of the 1967 lease." This finding is incorrect in fact.

As respondent's sole item of evidence to justify environmental pollution in 1982, the 1967 lease attested by the Devorace affidavit first surfaced in respondent's cross-filed motion to dismiss (11/23/82). This evidence was shown again by respondent in the opposition to petitioner's cross-filed motion for preliminary injunction. Petitioner had one opportunity to challenge the truth and legal effect of this excul-

patory evidence; in response to respondent's motion to dismiss. Petitioner argued the contradictory character and rebuttal effect of two of his exhibits (PT3-1 and PT3-2) originating from the Ohio Department of Natural Resources, Division of Oil and Gas.

Petitioner next challenged the 1967 lease and Devorace affidavit in the FRAP 28(a) brief to Sixth Circuit, as part of the argument as to Issue 4: THE DISTRICT IMPROPERLY GRANTED SUMMARY JUDGMENT IN A CASE HAVING UNRESOLVED GENUINE ISSUES AS TO MATERIAL FACTS.

Respondent's FRAP 28(b) brief argued the 1967 lease as conclusively proven by the Devorace affidavit and supportive of the summary judgment action by the district court.

The FRAP 28(c) brief included strong and explicit statements. Petitioner argued

in summation--

> Both of these documents [PT3-1 and the Devorace Affidavit] have been certified, or sworn, to be true. Both have been notarized. But, each contradicts the other's representation as to [respondent's] involvement with the proposed well-drilling activities. Only one of these documents can be accepted as true. If the representation on PT3-1 is true, the Devorace Affidavit is perjurious. If the Devorace Affidavit is true, someone has been supplying fraudulent information to the State of Ohio.

Thus, petitioner has three times, once in the district court and twice before a panel of the Sixth Circuit demonstrated a basis "to challenge the validity of the 1967 lease." The panel of the Sixth Circuit is wrong.

The panel of the Sixth Circuit in the NOT FOR PUBLICATION decision filed September 11, 1984 is silent as to two of the issues argued by petitioner's appeal. Issue 4: (unresolved genuine issues as to material facts). Issue 5: THE DISTRICT COURT ERRED IN *SUA SPONTE* CONVERTING A

MOTION TO DISMISS UNDER FED.R.CIV.P. 12(b) TO A RULE 56 MOTION FOR SUMMARY JUDGMENT WITHOUT GIVING THE REQUIRED NOTICE OF ITS INTENTION TO OPPOSING COUNSEL.

As to issue 5, the FRAP 28(a) brief of petitioner cited *Davis* v. *Zahradnick*, 500 F.2d 458 (CA4 1979); *United States* v. *Jones*, 570 F.2d 761 (CA8 1978); *Jensen* v. *Klecker*, 599 F.2d 243 (CA8 1979); *Allshire* v. *Darnell*, 508 F.2d 526 (CA8 1974); and *Winfrey* v. *Brewer*, 570 F.2d 765 (CA8 1974), decisions from other circuits, as authority for the proposition:

> Under contemporary federal procedure law, when a district court decides to treat a Rule 12(b) motion to dismiss as a motion for summary judgment the court must give the plaintiff notice of that intention and allow plaintiff a reasonable opportunity to submit opposing affidavits.

Petitioner thereafter cited the then controlling Sixth Circuit authority, *Kistner* v. *Califano*, 579 F.2d 1004 (CA6 1978). It was argued:

> In 1978, this Court held that where sufficient notice and adequate opportunity to respond were not afforded a plaintiff, and provisions of the rule pertaining to summary judgment were not complied with, a summary judgment had to be vacated and the case remanded for further proceedings.

The petitioner timely filed a FRAP 40 petition for rehearing asking the panel of Sixth Circuit to deal directly with the *sua sponte* summary judgment issue. As a point of fact which the panel had "overlooked or misapprehended" it was said:

> In deciding the appeal against plaintiff-appellant, the panel of this Court said something the district court did not! The district court did not say that defendant had filed a motion for summary judgment. The district court, *sua sponte*, said that 'defendant's motion [to dismiss] will be treated as a motion for summary judgment under Fed.R.Civ.P. 56' [App. 26] The panel decision (page 3), erroneously refers to 'defendant's motion for summary judgment.'

As a point of law which the panel may have overlooked, petitioner cited a just published decision [6/20/84] by another panel of Sixth Circuit on the same issue, *Yashon*

v. Gregory, 737 F.2d 547 (CA6 1984). Writing for that panel, in Part II, Judge Contie says:

> We conclude that the judgment must be vacated for two reasons, the first of which is that the district court did not follow proper procedures in granting summary judgment. Since the defendants never filed a summary judgment motion on the remanded issue, the district court's decision must be treated as a *sua sponte* grant of summary judgment. The clearly established rule in this circuit is that a district court must afford the party against whom *sua sponte* summary judgment is to be entered ten-days notice and an adequate opportunity to respond. *Kistner v. Califano*, 579 F.2d 1004 (6th Cir. 1978). 737 F.2d, at 552 [emphasis added].

The panel of the Sixth Circuit in petitioner's case has erroneously violated "the clearly established rule" in its own circuit.

In simple words, petitioner does not understand why the courts below can accept the threat of oil and gas well pollution in 1982 (and through this day) for the only reason that respondent may have said in a

1967 oil and gas lease with the Oxford Oil Company: "You and I can do it because I own it."

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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THE CLERK HAS DETERMINED THAT THE FOLLOWING APPENDIX PAGES A-1 THROUGH A-20 DO NOT COMPLY WITH THE COURT'S RULES GOVERNING EITHER SIZE OR SPACING OF TYPEWRITTEN MATERIAL.

A SUBSTITUTE APPENDIX WITH NEW AND PROPER COPIES HAS BEEN PROMPTLY SUBMITTED. REFERENCE THERETO HAS BEEN CHANGED ON PAGES 4, 8 AND 10, *SUPRA*.

COUNSEL FOR PETITIONER OFFERS HIS REGRETS.